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In the Supreme Court of the United States

OCTOBER TERM, 1996

FEDERAL ELECTION COMMISSION, PETITIONER

v.

JAMES E. AKINS, RICHARD CURTISS, PAUL FINDLEY, ROBERT J. HANKS, ANDREW KILLGORE, AND ORIN PARKER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an organization that spends more than $1,000 on contributions or coordinated expenditures in a calendar year, but is neither controlled by a candidate nor has as its major purpose the nomination or election of candidates, is a "political committee" within the meaning of the Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*

2. Whether respondents had standing to bring this suit.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the Federal Election Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. 1a-40a) is reported at 101 F.3d 731. The opinion of the court of appeals panel (App. 41a-74a) is reported at 66 F.3d 348. The opinion of the district court (App. 77a-93a) is unreported.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 6, 1996. On February 21, 1997, the

Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section 301(4)(A) of the Federal Election Campaign Act of 1971 (FECA or Act) defines the term "political committee" to include

> any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year.

2 U.S.C. 431(4)(A).

STATEMENT

1. This case involves provisions of the Federal Election Campaign Act of 1971 (FECA or Act) governing the activities of a "political committee," defined by the Act to include "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000

during a calendar year." 2 U.S.C. 431(4)(A).[1] The FECA requires political committees to satisfy certain organizational requirements. 2 U.S.C. 432. The Act also requires a political committee to register with the Federal Election Commission (FEC or Commission) and to file periodic reports of all of its receipts and disbursements for disclosure to the public. 2 U.S.C. 433, 434. The FECA provides in addition that no person may make contributions to a political committee which, in the aggregate,

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[1] Section 301(8)(A) of the FECA defines "contribution" to include

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
>
> (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. 431(8)(A).

Section 301(9)(A) of the Act defines the term "expenditure" to include

> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. 431(9)(A).

The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or the candidate's agents—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i). "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

exceed $5,000 in a calendar year. 2 U.S.C. 441a(a)(1)(C); see *FEC* v. *Massachusetts Citizens for Life, Inc.* (*MCFL*), 479 U.S. 238, 253-254 (1986) (plurality opinion) (describing requirements applicable to political committees).

Election-related expenditures made by individuals, and by groups that are not "political committees," are subject to extensive disclosure requirements. All "persons" (a term that includes any "organization or group of persons," 2 U.S.C. 431(11)) that make independent election expenditures aggregating more than $250 and are not political committees are required to file disclosure reports with the Commission. 2 U.S.C. 434(c); *MCFL*, 479 U.S. at 252-253 (plurality opinion). In addition, the Act requires that any contributions (including coordinated expenditures) aggregating more than $200 from such persons to candidates or political committees must be reported by the recipient political committees. 2 U.S.C. 434(b)(3). With respect to reporting requirements, the distinctive consequence of "political committee" status is that such an organization is required to make comprehensive disclosures of *all* of its receipts and disbursements, whether or not they bear any direct relation to electoral campaigns.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed a broad array of issues concerning the construction and constitutionality of the Act. The Court observed:

> The general requirement that "political committees" and candidates disclose their expenditures could raise * * * vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. The lower courts have construed the words "political committee" more narrowly. To fulfill

> the purposes of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79 (footnotes omitted).

The Court reaffirmed the "major purpose" test for status as a "political committee" in *MCFL*. A plurality noted that "this Court said [in *Buckley*] that an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" 479 U.S. at 252 n.6. And the Court observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262.

2. The FEC is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, 437g. Congress has authorized the Commission to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1); to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. 437c(b)(1), 437d(e); and to initiate actions in the federal courts to determine the constitutionality of any provision of the Act, 2 U.S.C. 437h. Congress has thus "vest[ed] in [the FEC] primary and substantial responsibility for administering and enforcing the Act." *Buckley*, 424 U.S. at 109.

The FECA states that "[a]ny person who believes a violation of this Act * * * has occurred, may file a

complaint with the Commission." 2 U.S.C. 437g(a)(1). The Act further provides that

> [a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. 437g(a)(8)(A). In such a proceeding, the reviewing court

> may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

2 U.S.C. 437g(a)(8)(C).

3. The American Israel Public Affairs Committee (AIPAC) is an incorporated, tax exempt organization with approximately 50,000 supporters and an annual budget of approximately $10 million. Its stated purpose is to maintain and improve friendship and goodwill between the United States and Israel. The organization's activities include lobbying Congress and the Executive Branch for military and economic aid to Israel. App. 2a-3a.

Respondents are former ambassadors, Members of Congress, or other government officials. In 1989 they filed an administrative complaint with the Commission, alleging that AIPAC had violated the FECA. Specifically, respondents alleged that AIPAC's activities brought it within the statutory definition of "political committee," and that

it had failed to comply with the statutory requirements to which political committees are subject. App. 3a-4a.[2]

The FEC's General Counsel investigated the allegations. The General Counsel

> conclude[d] that AIPAC has not become a political committee under the Act because AIPAC's campaign-related activities, while likely to have crossed the $1,000 threshold, constitute only a small portion of its overall activities and do[] not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

C.A. App. 189; see App. 43a. The General Counsel therefore recommended that the Commission find no probable cause to believe that AIPAC had violated 2 U.S.C. 433 and 434, the organizational and reporting requirements applicable to political committees. C.A. App. 194, 222. The General Counsel recommended, however, that the Commission find probable cause to believe that AIPAC had violated 2 U.S.C. 441b, which generally prohibits corporations from making campaign contributions and expenditures. C.A. App. 195, 222.

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[2] Respondents

> claimed that AIPAC met the statutory definition of political committee because, for example, it used full-time staff to meet with nearly every candidate for federal office, systematically disseminated campaign literature including candidates' position papers, and conducted regular meetings and phone calls with AIPAC supporters encouraging them to provide aid to particular candidates.

App. 3a-4a.

Consistent with the recommendation of the General Counsel, the Commission unanimously found no probable cause to believe that AIPAC had violated Sections 433 and 434. App. 95a. The Commission found probable cause to believe that AIPAC had violated Section 441b. *Ibid.* The FEC voted, however, to take no action regarding that determination, *ibid.*, explaining that "the Commission should clarify its membership definition before imposing penalties in close cases such as this," App. 98a.[3]

4. Respondents filed suit in federal district court. They challenged the FEC's determination that there was no probable cause to believe that AIPAC was a "political committee" within the meaning of the Act. The district court granted summary judgment for the Commission. The court concluded that "the Commission interpreted properly the statutory definition of 'political committee' and the 'major purpose' test." App. 92a. The court also determined that "the Commission's application of the

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[3] AIPAC contended that the alleged contributions in this case involved communications to AIPAC's own members and were therefore exempt from Section 441b's prohibition on corporate campaign contributions and expenditures. The FECA's definition of "expenditure" generally excludes "any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel." 2 U.S.C. 431(9)(B)(iii); see also 11 C.F.R. 100.8(b)(4), 114.3(a)(2). Consistent with the General Counsel's recommendation, a majority of the Commission concluded that "AIPAC did not meet the Commission's membership criteria," and therefore found probable cause to believe that AIPAC had violated Section 441b. App. 98a. The Commission also concluded, however, that the case "presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this, where the organization came close to meeting the 'spirit' of the Commission's membership criteria, but failed on a specific point." *Ibid.* The Commission therefore "decided to exercise [its] prosecutorial discretion, and to take no further action with respect to the finding on Section 441b." *Ibid.* (citation omitted).

major purpose test to the facts presented * * * regarding AIPAC's campaign-related activities was reasonable." *Ibid.*

5. A divided panel of the court of appeals affirmed. App. 41a-74a. The panel first held that respondents had standing to bring their suit. Relying on circuit precedent, the panel held that respondents' asserted "informational injury"—*i.e.*, respondents' contention that "their ability to influence and inform policymakers and the public is impaired by the lack of information about AIPAC's contributors and expenditures," App. 45a—was sufficient to meet the requirements of Article III. App. 45a-46a. The court also concluded that, "[b]ecause [respondents] allege that they are voters and persons who seek to communicate to policymakers and the public about AIPAC's campaign contributions, their interest in information about campaign contributions falls within the 'zone of interests' intended to be served by the statute." App. 47a.

On the merits, the panel concluded that this Court's decisions in *Buckley* and *MCFL* furnished a reasonable basis for the Commission's application of the "major purpose" test. The panel explained:

> Although *Buckley* and [*MCFL*] concern expenditures under the Act, the Court's rationale concerning the constitutional implications of a broad application of the Act to expenditures applies equally to the Act's reach over contributions. A broader construction of "political committee" would likely require advocacy groups to disclose their contributors even though the group is not principally involved in advancing the election or defeat of a candidate. This could raise a First Amendment issue of the sort seen in cases like *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). It is our duty in the interpretation of a federal

statute to avoid serious constitutional doubt. *United States v. Rumely*, 345 U.S. 41, 47 (1953).

App. 55a-56a (parallel citations omitted). The panel concluded that, "[b]ecause a judicial gloss on the statute has limited the application of FECA's restrictions for political committees to groups whose major purpose is the nomination or election of a candidate, the FEC's interpretation of the major purpose test was not contrary to law." App. 56a.[4]

Judge Silberman filed an opinion concurring in part and dissenting in part. App. 58a-74a. Relying on respondents' "assert[ion] that they compete with AIPAC in lobbying Congress and seeking to persuade the American people on their views of American interests regarding Arab-Israeli disputes," Judge Silberman viewed the suit as "akin to one brought by an economic competitor" and concluded that respondents satisfied the requirements of Article III. App. 58a-59a. On the merits, Judge Silberman acknowledged that "there is language in *Buckley* and *MCFL* that can literally be read to support the FEC's position." App. 68a. He concluded, however, that the "major purpose" test could not properly be applied to an organization that had made *contributions* (as opposed to independent expenditures) in excess of Section 431(4)(A)'s $1,000 limit. App. 73a. In Judge Silberman's view, any such organization is subject to the statutory requirements applicable to "political committees," whether or not campaign-related activities constitute a major purpose of the organization. *Ibid.*

6. The court of appeals vacated the panel decision and granted rehearing en banc. App. 75a-76a. The en banc court of appeals subsequently reversed the judgment of the district court. App. 1a-40a.

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[4] The panel also upheld, as reasonable, the Commission's determination that campaign-related activities were not a major purpose of AIPAC. App. 57a-58a.

a. The en banc court of appeals first concluded that respondents had standing as voters because "[t]hey have been deprived of certain specific information that Congress thought voters need to make an informed choice and therefore required 'political committees,' *inter alia*, to disclose." App. 8a. The court explained that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself just as a government contractor, allegedly wrongfully deprived of information to be made available at the time the bids are due, would suffer a particularized injury even if all other bidders also suffered an injury." App. 12a. Because it concluded that respondents "have standing as affected voters," it declined to "resolve whether [respondents] also have standing as political competitors of AIPAC, or whether [respondent] Findley—who was last a candidate in 1982—has standing as a candidate." App. 13a (citation omitted).

The court also rejected the FEC's argument that respondents' claim was not redressable because the Commission possesses enforcement discretion and might decline to compel disclosure by AIPAC. The court explained that "it has always been an acceptable feature of judicial review of agency action that a petitioner's 'injury' is redressed by the reviewing court notwithstanding that the agency might well subsequently legitimately decide to reach the same result through different reasoning." App. 15a. The court of appeals also noted that respondents would be authorized by the FECA to bring suit against AIPAC if the Commission failed to "conform" to the court's "declaration." *Ibid.* (quoting 2 U.S.C. 437g(a)(8)(C)). The court stated that "[i]t would appear under [Section 437g(a)(8)(C)] that if the Commission gave only lip service to compliance with [the court's] order and settled with AIPAC without requiring disclosure, * * *

[respondents] would be able to seek disclosure directly." *Ibid.*

b. On the merits, the en banc court of appeals concluded that AIPAC was a "political committee" within the meaning of the FECA. The court rejected the Commission's argument that the FEC's contrary conclusion was entitled to deference under the principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court reasoned that the controversy involved the proper construction of this Court's opinions in *Buckley* and *MCFL*, and that deference to the agency therefore was inappropriate. App. 19a-20a.

Addressing the interpretive issue "*de novo*," the court of appeals framed the "key question" as "whether the Supreme Court's major purpose limitation imposed in certain circumstances for constitutional reasons applies in another circumstance—this case—in which the same constitutional concerns may not be implicated." App. 20a. The court acknowledged that "language in *Buckley* and *MCFL* can literally be read to support the FEC's position." App. 21a. The court reasoned, however, that "both cases focused on the constitutional concerns raised by independent expenditures * * * as distinguished from coordinated expenditures or direct contributions." *Ibid.* The court noted that "[i]ndependent expenditures are the most protected form of political speech because they are closest to pure issue discussion and therefore farthest removed from the valid goal of preventing election corruption." *Ibid.*

The court of appeals construed the disputed language in *Buckley* to mean only that, "when an organization controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be expenditures within the statutory definition." App. 24a. It concluded that the

Buckley Court "clearly distinguished independent expenditures and contributions as to their constitutional significance, and its references to a 'major purpose' test seem to implicate only the former." *Ibid.* The court of appeals read the *MCFL* opinion in a similar fashion. App. 24a-25a.

The court of appeals also believed that the Commission's approach would have untoward practical consequences. Thus, the court stated:

> The FEC's interpretation of "political committee" would * * * allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not.

App. 27a. In the court's view, that approach "would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of 'political committee.'" *Ibid.*

The court concluded:

> There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A)'s plain terms. The FEC found that AIPAC likely made campaign contributions in excess of $1,000. Its decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of [respondents'] complaint, were therefore based on its mistaken interpretation of § 431(4)(A). This error requires that we reverse the dismissal of the com-

plaint and remand to the FEC for further action not inconsistent with this opinion.

App. 29a.

c. Judge Sentelle, joined by Judge Henderson, dissented. App. 30a-40a. The dissenting judges concluded that respondents asserted only a "generalized grievance"—"a diffuse rather than a particularized injury"—and therefore lacked standing under Article III. App. 32a-33a. They explained that respondents "have no statutory right, through section 437g or any other provision, to force the FEC to collect and turn over this information. In the absence of such a right, no injury—informational or otherwise—is possible." App. 38a. The dissenting judges also concluded that any injury respondents might have suffered was not redressable by a judicial order. They explained that respondents' "claim of redressability depends on the linked chain that the Commission will enter an order against AIPAC requiring the information [respondents] seek, that AIPAC will comply with that order, and that [respondents] will still be sufficiently interested in the information thus produced that they will renew their claim on FEC to present them with that information." App. 40a. In the view of the dissenting judges, that chain of inferences was "too attenuated to provide the sort of redressability necessary to meet Article III standing." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case conflicts with this Court's decisions construing the FECA's definition of "political committee," and it places substantial burdens on organizations engaged primarily in issue advocacy by requiring that they disclose all of their receipts and disbursements. Because the Commission's dismissal of a complaint is reviewable only in the D.C. Circuit, the FEC will be effectively precluded from advancing its construc-

tion of the Act in any other court of appeals. The court of appeals has also adopted an unduly broad view of standing under the special judicial review provision invoked by respondents. Review by this Court is therefore warranted.

1. a. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam), this Court addressed a wide range of issues concerning the interpretation and constitutionality of the FECA. In discussing the financial disclosure requirements imposed by the FECA, the Court observed:

> To fulfill the purposes of the Act [the term "political committee"] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.

Id. at 79. *Buckley* involved this Court's resolution of a broad array of certified constitutional questions, see, *e.g.*, *id.* at 84 n.113; and the Court's analysis of the "political committee" provisions did not focus on the application of those provisions to any particular organization or pattern of spending. The Court's formulation of the "major purpose" test does not, by its terms, attach any significance to the distinction the court of appeals drew between contributions and independent expenditures.

Nor is there any basis for the court of appeals' suggestion that the language quoted above means only that, "when an organization controlled by a candidate or the major purpose of which is election-related makes disbursements, those disbursements will presumptively be expenditures within the statutory definition." App. 24a. The *Buckley* Court's formulation of the "major purpose" test makes clear that the inquiry should focus on the purpose

of the *organization*, not on the purpose of a particular disbursement. See 424 U.S. at 79 (referring to "organizations * * * the major purpose of which is the nomination or election of a candidate"). The "major purpose" test, as described by the Court in *Buckley*, simply was not designed to determine whether a particular disbursement constitutes an "expenditure" within the meaning of the Act.

That point is made particularly clear by this Court's subsequent decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), in which the Court reaffirmed the "major purpose" test for status as a "political committee." A plurality of the *MCFL* Court stated that "[i]n [*Buckley*] this Court said that an entity subject to regulation as a 'political committee' under the Act is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" *Id.* at 252 n.6 (quoting *Buckley*, 424 U.S. at 79). MCFL had spent nearly $10,000 in publishing a "Special Edition" of its newsletter. See *id.* at 244. The Court squarely held that the "Special Edition" contained "express advocacy" of the election or defeat of identified candidates, and that the payments made to publish it were therefore "expenditures" within the meaning of the Act. *Id.* at 248-251.

The Court nevertheless concluded that MCFL was not a "political committee." Thus, the plurality stated that it was "undisputed on this record" that MCFL did not fall within the *Buckley* Court's definition of "political committee" because MCFL's "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." 479 U.S. at 252 n.6. And the majority observed that, "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political

committee." *Id.* at 262. Thus, while squarely holding that MCFL had made expenditures well in excess of $1,000 during the year in question, the Court determined that MCFL was not a "political committee," based on its finding that campaign-related activities were not the organization's "major purpose." The *MCFL* Court's analysis is flatly inconsistent with the court of appeals' view of the "major purpose" test as merely a means to determine whether particular disbursements constitute "expenditures."

The en banc court of appeals acknowledged that "language in *Buckley* and *MCFL* can literally be read to support the FEC's position." App. 21a. The court nevertheless concluded that an organization making more than $1,000 per year in FECA "contributions" must be treated as a "political committee" whether or not its major purpose is campaign-related activity. The court of appeals erred in departing from this Court's construction of the statutory term "political committee" based on its own assessment of the competing pragmatic and constitutional concerns.

b. In any event, the premise of the court of appeals' decision—that the concerns underlying the *Buckley* Court's narrow construction of "political committee" are inapplicable to organizations that make more than $1,000 per year in contributions—is incorrect. The Court in *Buckley* recognized that "compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment," and that "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." 424 U.S. at 64; see also, *e.g.*, *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). The *Buckley* Court concluded that, as a general matter, the Act's disclosure requirements "appear to be the least restrictive means of curbing

the evils of campaign ignorance and corruption that Congress found to exist." 424 U.S. at 68. The Court remained concerned, however, about the potential impact of the disclosure provisions upon groups and individuals "engaged purely in issue discussion." *Id.* at 79.

The Court addressed that concern in two distinct ways. With respect to individuals and groups other than political committees, the Court construed the term "expenditure" as "reach[ing] only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80 (footnote omitted). The Court observed that "[t]his reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." *Ibid.* So construed, the Court held, "the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced." *Id.* at 81.

The disclosure requirements applicable to political committees, however, raise distinct concerns. Political committees are required to file regular reports of *all* of their receipts and disbursements, including those relating to issue advocacy rather than campaign-related activity. As applied to an organization whose campaign-related spending constitutes a small percentage of the overall operation, the Act's disclosure requirements could place substantial burdens on core First Amendment activities while contributing only slightly to the achievement of the statutory purposes. The *Buckley* Court addressed that danger by construing the term "political committee" as limited to "organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. Because the receipts and disbursements of such organizations "are, by definition, campaign related," *ibid.*, application of the Act's broad disclosure requirements to "political committees"

so defined can be expected to have little impact on non-campaign-related speech. The Court concluded that the purposes of both the Act and the First Amendment are properly served by construing the Act to require a group whose major purpose is campaign-related activity to report all of its receipts and disbursements, but not to impose such a broad reporting requirement (and attendant burdening of associational interests) on issue-advocacy groups that only occasionally make election expenditures.

Thus, the limiting construction given to the statutory term "political committee" in *Buckley* serves to address the danger that small amounts of campaign-related expenditures by an organization may trigger a far-reaching obligation to disclose non-campaign-related receipts and disbursements, including receipts and disbursements used for issue advocacy. As the panel in this case correctly recognized (see App. 55a), that danger is equally present whether the triggering disbursements are independent expenditures or direct contributions.[5] The en banc court

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[5] The en banc court of appeals correctly observed (see App. 21a-22a) that governmental regulation of independent expenditures raises more pressing constitutional concerns than does regulation of direct contributions. This Court has recognized a "fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign." *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985). That constitutional difference, however, is irrelevant to the basis for and proper application of the "major purpose" test. As applied to organizations that make independent expenditures, the point of the "major purpose" test is not to prevent application of the FECA's disclosure provisions to the independent expenditures themselves. To the contrary, the *Buckley* Court made clear that reporting of independent expenditures may constitutionally be required, even where the expenditure is made by a person other than a political committee. 424 U.S. at 80-82. Rather, the "major purpose" test is designed to shield organizations that only occasionally make campaign-related expenditures from compelled

was therefore wrong in concluding (see App. 24a) that the concerns underlying the *Buckley* Court's holding are not implicated in cases involving direct contributions or coordinated expenditures.[6]

c. The en banc court of appeals also criticized the Commission's approach on the ground that

> [t]he FEC's interpretation of "political committee" would * * * allow a large organization to contribute substantial sums to campaign activity, as long as the contributions are a small portion of the organization's

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disclosure of the *other* associational and communicative activities, unrelated to electoral campaigns, that are their primary enterprise. Application of the FECA's disclosure requirements to *those* organizations is equally problematic—and equally unrelated to the FECA's purposes—whatever the nature of the campaign activities that triggered the reporting requirements in the first instance.

[6] This Court has recognized that "the Commission is precisely the type of agency to which deference should presumptively be afforded." *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). The court of appeals nevertheless declined to give deference to the Commission's position here, stating that it was "not obliged to defer to an agency's interpretation of Supreme Court precedent." App. 19a. That reasoning was flawed.

Although the court of appeals characterized its task as the "interpretation of Supreme Court precedent," the court did not suggest that either *Buckley* or *MCFL* had declared the "major purpose" test to be inapplicable to groups making direct contributions. Rather, the court concluded that application of the Act's "political committee" provisions to such groups would not raise the concerns identified by the *Buckley* Court as the justification for the "major purpose" test. To the extent that the Court's construction of a statutory term leaves open additional questions about the application of the provision, the policies supporting deference to an agency's expert resolution of those questions remain applicable. That is especially so since the definition of "political committee" was reenacted in 1980 (see Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, § 101, 93 Stat. 1339) after this Court's decision in *Buckley*, and the question for the Commission therefore is how to interpret the Act as it *now* exists.

> overall budget, without being subject to the limitations and requirements imposed on political committees. Thus, an organization spending its entire $1 million budget on campaign activity would be a political committee, while another organization spending $1 million of its $100 million budget on campaign activity would not.*

App. 27a. That distinction, however, is inherent in the "major purpose" test adopted by this Court in *Buckley*. Even under the court of appeals' approach, "an organization spending its entire $1 million budget on [independent expenditures] would be a political committee, while another organization spending $1 million of its $100 million budget on [independent expenditures] would not." The court of appeals did not explain why that disparity is acceptable in the context of groups making independent expenditures, but an intolerable flaw that "would wholly eviscerate the $1,000 limit in § 431(4)(A)'s definition of 'political committee'" (*ibid.*) when applied to groups making contributions or coordinated expenditures.

Any apparent anomaly disappears, moreover, once the justification for the *Buckley* Court's narrowing construction is understood. As we have explained, that construction addresses the danger that an organization might be subject to extensive disclosure requirements with respect to non-campaign-related receipts and disbursements based on its modest involvement in campaign activity. The hypothetical "organization spending its entire $1 million budget on campaign activity" (App. 27a) *has* no non-campaign-related receipts or disbursements. To treat such an organization differently from an organization that spends only 1% of its funds ("$1 million of its $100 million budget") on campaign activity is in no way anomalous. That disparity simply reflects the fact that the *Buckley* Court's concern—that the FECA's

disclosure requirements might have the effect of unnecessarily burdening the non-campaign-related speech of an organization that only occasionally makes election expenditures—is implicated in one situation but not in the other.

Application of the "political committee" provisions is unnecessary to ensure that significant contributions and independent expenditures are exposed to public view. Campaign-related activity by persons other than political committees is subject to extensive reporting requirements. See page 4, *supra*. Groups other than political committees are subject to other FECA provisions as well. Such groups are subject, for example, to the statutory limitation of $1,000 in contributions to any candidate for federal office. See 2 U.S.C. 441a(a)(1)(A). To require groups that are minimally involved in campaign-related activity to report *all* of their receipts and disbursements is thus unnecessary to effectuate the purposes of the Act.

The court of appeals' decision has broad ramifications for the regulated community and for issue-oriented and lobbying groups that are only tangentially related to election campaigns. The en banc court has held that any organization that spends more than $1,000 on coordinated campaign expenditures, or on direct or in-kind contributions, must abide by all of the requirements applicable to political committees. The court of appeals acknowledged that, "[o]nce designated a political committee, an organization must file periodic reports disclosing all receipts and disbursements and identifying each individual to whom it gives or from whom it receives more than $200." App. 3a. The court made no effort, however, to address the practical and constitutional problems that arise from applying those requirements to every group that has made a single coordinated expenditure of more than $1,000.

d. In light of the unusual statutory provisions governing challenges to the Commission's enforcement

decisions, review by this Court is warranted even in the absence of a conflict in the circuits. The Commission's decision to dismiss a complaint filed by a private party is reviewable only in the United States District Court for the District of Columbia. 2 U.S.C. 437g(a)(8)(A). When the Commission finds probable cause to believe that a violation of the FECA has occurred, however, any enforcement action must be brought by the Commission "in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business." 2 U.S.C. 437g(a)(6)(A).

The court of appeals' decision in this case, if not reviewed by this Court, will place the Commission in an untenable position. If the FEC adheres to its current definition of "political committee," and declines to bring an enforcement action under 2 U.S.C. 433 and 434 unless the "major purpose" test is satisfied, its dismissal of private parties' complaints will always be subject to challenge in the D.C. Circuit. The question presented in this case will come before another court of appeals only if the Commission brings an enforcement action premised on the D.C. Circuit's interpretation of the statute. The Commission believes, however, that the D.C. Circuit's decision raises unnecessary practical and constitutional questions, rests on an erroneous construction of the Act, and is directly contrary to this Court's decisions in *Buckley* and *MCFL*.

2. The court of appeals also erred in holding that respondents had standing to bring their suit. Article III of the Constitution confines the jurisdiction of the federal courts to actual "Cases" and "Controversies," and "the doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990).

> To satisfy the "case" or "controversy" requirement of Article III, which is the "irreducible constitutional minimum" of standing, a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Bennett v. *Spear*, No. 95-813 (Mar. 19, 1997), slip op. 6. See also, *e.g.*, *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992); *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982); *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976).

The complaint filed in this case does not challenge any exercise of regulatory authority over respondents themselves. Nor do respondents assert a right to obtain information that is actually in the government's possession. Cf. *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 449 (1989) (Court's "decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records"). Rather, respondents challenge the Commission's failure to take enforcement action against another private party concerning information in that party's possession. "[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish." *Defenders of Wildlife*, 504 U.S. at 562 (internal quotation marks omitted). In the present case, respondents fail to satisfy the requirements of Article III.[7]

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[7] The court of appeals suggested that the Commission had conceded respondent Findley's standing as a candidate. See App. 6a & n.2. That is incorrect. Respondents did not allege that Findley had standing as a candidate or intended to run for office in the future, although they did allege that Findley was a former member of the House of Representatives. The FEC's brief to the en banc court noted the absence of any allegation that respondents were candidates. FEC C.A. In Banc Br. 22.

a. The court of appeals concluded that respondents had established standing as "affected voters," reasoning that "[a] voter deprived of useful information at the time he or she votes suffers a particularized injury in some respects unique to him or herself." App. 12a. The court of appeals' only basis for describing respondents as "affected" voters distinct from the electorate as a whole is its statement that "there is nothing to indicate that [respondents] did not vote in various federal elections in which AIPAC allegedly made contributions that qualified it as a political committee." App. 13a. That statement provides no justification for the court's finding of a "particularized injury." Any injury respondents may suffer is shared by all voters in elections in which AIPAC engaged in campaign activity, and the agency action they seek to compel "no more directly and tangibly benefits [them] than it does the public at large." *Defenders of Wildlife*, 504 U.S. at 574. Respondents' alleged injury is thus insufficiently concrete and personal to establish an injury in fact under Article III. Rather, the "asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens." *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). "[T]hat harm alone normally does not warrant exercise of jurisdiction." *Ibid.*

In any event, the statutory provision under which respondents have sued, 2 U.S.C. 437g(a)(8), provides for a party who filed a complaint that was subsequently dismissed by the Commission to file a petition for review in the district court only if that party has been "aggrieved" by the dismissal. Cf. *Liquid Carbonic Indus.*

Corp. v. *FERC*, 29 F.3d 697, 702 (D.C. Cir. 1994) (Federal Power Act provision authorizing judicial review for "[a]ny party * * * aggrieved" is narrower than Administrative Procedure Act's judicial review provision, 5 U.S.C. 702). In light of the generalized nature of the grievance respondents raise—and the background rule that private persons do not have a judicially cognizable interest in the decision by the government not to take an enforcement action against a third party (see, *e.g.*, *Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973))—Section 437g(a)(8) should not be construed so broadly as to encompass respondents' claim. The courts should not lightly conclude that Congress intended to include persons such as respondents as parties "aggrieved" by the Commission's dismissal of a complaint seeking to require it to bring an enforcement action against a private organization with respect to disclosure of all the organization's receipts and disbursements. Compare *Bennett* v. *Spear*, slip op. 8 ("Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated.").

b. Nor can respondents establish standing as "competitors" of AIPAC. Insofar as respondents assert a diminution of their ability to lobby U.S. policymakers, the traceability and redressability analysis must focus on the presence or absence of a causal link between the Commission's dismissal of the administrative complaint and respondents' ability to influence U.S. policy towards the Middle East. That purported causal connection is too speculative to satisfy Article III. Respondents have offered no basis for concluding that AIPAC's compliance with the requirements of Sections 433 and 434 would make an "appreciable difference," *Allen* v. *Wright*, 468 U.S. at 758, in their ability to effect changes in U.S. foreign policy. Any such impact would depend entirely upon the subjective reactions of Members of Congress and of the

public to the information disclosed. Because "a federal court [can] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court," *Eastern Kentucky Welfare Rights Org.*, 426 U.S. at 41-42, respondents' claim of competitive injury is not sufficient to invoke the federal judicial power.[8]

c. Even if the FEC were to find probable cause to believe that AIPAC had violated Sections 433 and 434, the Commission is not required to institute a civil enforcement action in every instance in which it concludes that a violation has occurred.[9] Moreover, there is no guarantee

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[8] In any event, respondents' alleged competitive injury is not a sufficient basis for concluding that they are "aggrieved," within the meaning of Section 437g(a)(8), by the Commission's dismissal of their complaint. Respondents' desire to engage in more effective lobbying is only fortuitously related to the purposes of the FECA's disclosure requirements, which are directed to election campaigns.

[9] AIPAC has contended that the alleged contributions in this case involved communications to AIPAC's own members, which are specifically exempted from the statutory definition of "expenditure." See note 3, *supra*. The Commission rejected that argument and found probable cause to believe that AIPAC had violated the ban on corporate campaign expenditures and contributions set forth in 2 U.S.C. 441b. The FEC declined to take further action with respect to that finding, however, because it believed that the case "presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this." App. 98a; see note 3, *supra*. Respondents have not challenged the Commission's authority to exercise its prosecutorial discretion in that manner.

Even under the court of appeals' view of the statute, any finding that AIPAC is in violation of the FECA provisions governing "political committees" would depend upon the antecedent determination that the communications at issue are properly characterized as contributions—*i.e.*, that they were sent to persons other than AIPAC's own members. That is the same determination that the Commission regarded as suf-

that any remedy imposed by a court, or negotiated by the Commission as part of a conciliation agreement, see 2 U.S.C. 437g(a)(4)(A)(i), would result in the disclosures that respondents seek. The parties have little or no idea whether AIPAC has retained the information sought by respondents; a monetary penalty might be deemed a sufficient remedy to forgo enforcement litigation; and the Act does not provide for judicial review of conciliation agreements. Compare 2 U.S.C. 437g(a)(5) with 2 U.S.C. 437g(a)(8)(A).

d. Finally, respondents' claim of competitive standing is especially weak in the instant case, since the court of appeals' resolution of the "political committee" issue has no effect on the legality vel non of AIPAC's political spending. As a corporation, AIPAC is entirely forbidden to make any contributions or expenditures in federal election campaigns. 2 U.S.C. 441b.[10] Because Section 441b prohibits AIPAC from making campaign contributions *at*

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ficiently close so as to warrant a decision to take no further action with respect to Section 441b.

[10] In *MCFL*, this Court recognized a narrow, constitutionally based exception to Section 441b's ban on corporate campaign expenditures. The Court noted that MCFL (1) "was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." 479 U.S. at 264. The Court concluded on that basis "that § 441b's restriction of independent spending is unconstitutional as applied to MCFL." *Id.* at 263.

In the instant case, the FEC's General Counsel concluded that AIPAC does not fall within the *MCFL* exception to Section 441b because AIPAC has accepted contributions from business corporations. C.A. App. 192-194. In any event, the *MCFL* exception applies only to independent expenditures. See 479 U.S. at 259-260, 263. AIPAC would therefore be prohibited from making direct or in-kind contributions even if it satisfied the criteria set forth in *MCFL*.

all, the manner in which Section 431(4)(A) is applied to groups that contribute more than $1,000 to political campaigns can have little practical effect on AIPAC's activities.

As noted above (see notes 3 and 9, *supra*), AIPAC has consistently argued that the payments at issue in this case involved communications to AIPAC's own members. If (as the Commission has concluded, see App. 98a) AIPAC failed to satisfy the FEC's membership criteria, Section 441b would prohibit the organization from making those payments. If AIPAC's position ultimately prevails, there would be no basis for concluding that the organization had made contributions in excess of $1,000, and consequently no basis for concluding that AIPAC was a "political committee" within the meaning of Section 431(4)(A), whether or not a "major purpose" test applies.[11] There is no reason to suppose that AIPAC's political spending would be altered, or respondents' interests advanced, by a determination that AIPAC was in violation of Sections 433 and 434 as well as of Section 441b.

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[11] The Commission's statement of reasons in this case, issued on July 27, 1992, noted that the FEC "anticipate[d] the Commission soon will conduct a regulatory proceeding to review its membership criteria in an effort to eliminate confusion about these requirements." App. 99a. In 1993 the Commission promulgated a new regulatory definition of the term "member." See 58 Fed. Reg. 45,775 (codified at 11 C.F.R. 114.1(e)(2)). During the pendency of the appeal in this case, the D.C. Circuit invalidated that regulation, concluding that it defined the term "member" in an unduly restrictive fashion. See *Chamber of Commerce* v. *FEC*, 69 F.3d 600, 604-606 (1995). That decision casts further doubt on respondents' prospects of ultimately obtaining an order compelling disclosure of AIPAC's receipts and disbursements.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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